

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Curtis O’Neil,)	CASE NO. 1:15 CV 960
)	
Petitioner,)	JUDGE PATRICIA A. GAUGHAN
)	
vs.)	
)	
John Coleman, Warden)	<u>Memorandum of Opinion and Order</u>
)	
Respondent.)	

Introduction

This matter is before the Court upon the Report and Recommendation of Magistrate Judge McHargh (Doc. 7) which recommends dismissal of the Petition for Writ of Habeas Corpus pending before the Court. Petitioner filed objections to the recommendation. For the following reasons, the Report and Recommendation is ACCEPTED.

Standard of Review

Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides, “The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any

proposed finding or recommendation.”

Discussion

Petitioner is incarcerated following his convictions for rape, aggravated robbery, aggravated burglary, and other charges in the Portage County Court of Common Pleas. The Magistrate Judge found the Petition, which raises seven grounds for relief, to be untimely. This Court agrees.

Under the AEDPA, petitioner had one year to file his Petition from the date his conviction became final by the conclusion of direct review, or the expiration of the time for seeking such review. Petitioner’s conviction became final on January 4, 2012- 90 days after the Ohio Supreme Court denied review of his appeal and petitioner did not seek certiorari in the U.S. Supreme Court. Therefore, petitioner had until January 4, 2013 to file his Petition. This Petition was filed on May 15, 2015, more than two years later.

The Magistrate Judge rejected petitioner’s contention that he is entitled to equitable tolling based on actual innocence because his argument regarding DNA evidence was not supported by “new evidence” as required. Rather, his counsel had presented the same argument to the state court of appeals on direct review. In his objections, petitioner presents nothing to alter that conclusion. Therefore, the Court finds the Magistrate Judge’s determination persuasive.

For these reasons, the Court concludes that the Petition is untimely.

Conclusion

For the reasons set forth herein and for the reasons set forth in the Magistrate Judge’s Report and Recommendation, the Petition for Writ of Habeas Corpus is dismissed.

Furthermore, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Patricia A. Gaughan

PATRICIA A. GAUGHAN

United States District Judge

Dated: 4/4/16